

UNITED STATES
v.
RICHARD H. FRANKLIN

IBLA 79-585

Decided January 14, 1980

Appeal from decision of Administrative Law Judge Dean F. Ratzman, declaring the PAL lode mining claim null and void. Contest No. CA-5081.

Affirmed.

1. Administrative Procedure: Hearings -- Hearings -- Mining Claims:
Contests -- Rules of Practice: Hearings -- Rules of Practice:
Government Contests

Where a mining claim contestee fails to appear at a contest hearing and merely sends a message stating that he will not appear, without stating the reasons for his absence, a subsequent motion to reschedule the hearing and reopen the record is properly denied, as the regulations provide that a postponement may be granted only pursuant to a request made no later than the hearing date and stating in detail the reasons why a postponement is necessary.

2. Administrative Procedure: Hearings -- Hearings -- Mining Claims:
Contests -- Rules of Practice: Hearings -- Rules of Practice:
Government Contests

The asserted inability of a contestee to drive an automobile due to his taking medication is not an extreme emergency which justifies beyond question the granting of a postponement of the hearing where it is not

impossible to get to a hearing site by public transportation. Nor is restricted mobility due to arthritis justification for a postponement where the record shows that it is an ongoing condition which could have been anticipated, and that transportation to the hearing site could have been arranged by exercise of proper diligence.

3. Mining Claim: Contests

When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery.

4. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Contests -- Rules of Practice: Hearings -- Rules of Practice -- Government Contests

Where a party fails to appear or participate in a hearing as scheduled even though no order postponing the hearing has been issued, the merits of the case may be reached and decided on the basis of the record as completed at the hearing, despite the absence of evidence in support of the party's case.

5. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Contests -- Rules of Practice: Hearings -- Rules of Practice -- Government Contests

New evidence offered on appeal after an initial decision is rendered by an Administrative Law Judge may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing.

APPEARANCES: Richard H. Franklin, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On June 14, 1978, the Director of the California State Office, Bureau of Land Management (BLM), filed contest complaint No. CA 5081 on behalf of the National Park Service, seeking to have the PAL lode mining claim declared null and void. On June 23, 1978, Richard H. Franklin, named as contestee in this complaint, filed a timely answer denying the accuracy of the charges.

On March 22, 1979, the matter was set for hearing on May 2, 1979, before Administrative Law Judge Dean F. Ratzman. On March 26, 1979, BLM's legal representative notified Judge Ratzman that this scheduling created a conflict with another hearing date and requested that the hearing be rescheduled. Accordingly, on April 4, 1979, Judge Ratzman rescheduled the hearing for 10:00 a.m. on May 22, 1979, in Lawndale, California. The record shows that a copy of this notice was received at Franklin's home in Newport Beach, California, on April 9, 1979.

Franklin did not appear at the hearing. After waiting 40 minutes for him, Judge Ratzman took evidence from the Government concerning the validity of his claim. During the hearing, a message was received indicating that Franklin had telephoned at 9:15 a.m. to inform Judge Ratzman that he was not going to attend the hearing (Tr. 26-7). The message offered no explanation for his failure to appear and did not request a postponement. The Government concluded its presentation and the hearing was closed.

On June 6, 1979, Franklin wrote to Judge Ratzman, explaining that he was unable to attend the hearing because of an unspecified "health problem." Franklin also enclosed documentary material bearing on the validity of the mining claim.

On June 14, 1979, Judge Ratzman advised Franklin that the regulations provide that if a request for a postponement is made at the hearing or less than 10 days in advance of the hearing, the requesting party must demonstrate that an extreme emergency occurred which could not have been anticipated and which justified beyond question the granting of a postponement, and that the request must state in detail the reasons why a postponement is necessary. Judge Ratzman concluded that he would not reschedule the hearing or reopen the record as Franklin had failed to demonstrate in adequate detail why a postponement was necessary. Accordingly, he returned Franklin's documents to him.

On June 28, 1979, Franklin filed a letter explaining that the health problem to which he alluded was that he was taking prescribed medication and did not know until May 21 that he should not drive an automobile. He alleged that he began to try to contact the Judge on May 21 and argued that grounds did exist for postponing the hearing.

On August 15, 1979, Judge Ratzman issued his decision declaring the PAL lode mining claim null and void. In this decision, he noted that the hearing site was easily accessible by public transportation and taxi and concluded that Franklin had displayed a very casual attitude toward his opportunity to attend the hearing, and that justification for holding an additional hearing session did not exist. Judge Ratzman concluded that the Government had established a prima facie case of invalidity of the claim, and, ignoring their late submission, that the assertions concerning assessment work contained in Franklin's documentation would not be enough to overcome the prima facie case made by the Government even if supported by testimony at a hearing. Franklin (appellant) has appealed from this decision.

[1] Under 43 CFR 4.452-3(b), a request for a postponement must be made no later than the date of the hearing and must state in detail the reasons why a postponement is necessary. If the requirements of this section are not met, the Judge is without authority to postpone the hearing. United States v. Mine Development Corp., 27 IBLA 238 (1976.)

It is clear that Judge Ratzman properly concluded that appellant was not entitled to have the hearing rescheduled or the record reopened here. First, in the message delivered to the Judge at the hearing, appellant did not even request a postponement, let alone state in detail the reasons why a postponement was necessary. He simply baldly stated that he would not attend the hearing. It was not until over 2 weeks after the hearing that appellant first stated his reason for not attending (describing it only as a health problem), and it was yet another 2 weeks before he stated this reason with specificity. Thus, appellant did not comply with the regulations.

[2] Moreover, under 43 CFR 4.452-3(a), postponement of a hearing will not be allowed except on a showing of good cause and proper diligence, and where the request is made less than 10 days in advance of the hearing or made orally at the hearing, it will not be granted unless the requesting party demonstrates that an extreme emergency occurred which could not have been anticipated and which justifies beyond question the granting of a postponement.

Appellant's asserted reason for not attending, *i.e.*, that he was taking medication and could not drive an automobile, was neither an extreme emergency which justified beyond question the postponing of the hearing, nor even good cause for a postponement. As Judge Ratzman pointed out, it was by no means impossible for appellant to attend this hearing, even though he could not operate an automobile, as alleged. He could have taken public transportation or arranged for a friend to transport him to the hearing site. By exercising a minimum of diligence, appellant could have attended this hearing.

On appeal, Franklin offered a slightly different explanation of his failure to appear at the hearing, stating that he suffers from an arthritic condition which restricts his mobility. Again, even if appellant had offered this detailed explanation at or prior to the hearing, as required, he would not prevail. Appellant's condition is apparently an ongoing one, as he was also allegedly unable to walk and so could not accompany the mineral inspector on his tour of the claim in 1978 (Tr. 8-9). While we appreciate appellant's problem, we are constrained to note that it was foreseeable that he would have difficulty getting to the hearing, and that this difficulty could have been circumvented with due diligence. Therefore, we hold that Judge Ratzman properly declined to postpone the hearing or to reopen the record.

[3] When the Government contests a mining claim on a charge of no discovery, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Zweifel, 508 F.2d 1150 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976).

The Government has established a prima facie case when a mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery. United States v. Bechtold, 25 IBLA 77 (1976); United States v. MacIver, 20 IBLA 352 (1975); United States v. Ramsey, 14 IBLA 152 (1974); United States v. Blomquist, 7 IBLA 351 (1972). We agree with Judge Ratzman that testimony by the Government's witnesses was adequate to establish a prima facie case of invalidity.

[4] Where a party fails to appear or participate in a hearing as scheduled even though no order postponing the hearing has been issued, the merits of the case may be reached and decided on the basis of the record as completed at the hearing, despite the absence of evidence in support of the party's case. United States v. Mine Development Corp., *supra*; see United States v. Andy Syndbad, 42 IBLA 313 (1979); United States v. Russ Knecht, 39 IBLA 8 (1979). Thus, having presented no evidence of validity, appellant cannot prevail, as he did not meet his burden of producing preponderating evidence of the existence of a valuable mineral deposit sufficient to support a discovery.

[5] On appeal, appellant has submitted information in support of the validity of his claim. Generally, the basis for a decision made after a hearing is the evidentiary record made at the hearing. 43 CFR 4.24. New evidence offered on appeal after an initial decision is rendered by an Administrative Law Judge may not be considered or relied upon in making a final decision but may only be considered to determine if there should be a further hearing. United States v. George R. Edeline, 24 IBLA 38, 44 (1975).

The evidence presented to us by appellant neither excuses his failure to exercise his right to a hearing nor demonstrates that the ruling below is so patently erroneous that it would work an injustice to allow it to stand. Therefore, we do not consider this information as a basis for our decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

